FORM NLRB-501 (11-94) FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
32-CA-071247	12/21/2011

INSTRUCTIONS:
File orig. + 4 copies of charge with NLRB Reg. Dir. for the region in which the alleged unfair labor practice occurred/is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer | *b. Number of workers employed*

Tesla Motors, Inc. | 125

c. Address (street, city, state, ZIP) | *d. Employer Representative* | *e. Telephone No.*

500 Deer Creek Road
Palo Alto, CA 94304 | (b) (6), (b) (7)(C) | (650) 681-5101

f. Type of Establishment (factory, wholesaler) | *g. Identify principal product/service*

factory | automobiles and automotive products

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NLRB REGION 32
2011 DEC 21 P 1:41
OAKLAND, CA

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

In the past six months the Employer has terminated (b) (6), (b) (7)(C) employees, (b) (6), (b) (7)(C) in retaliation for their protected concerted activities.

3. Full name of party filing charge (if labor organization, give full name, Local name & number)

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO

4a. Address (street, city, state, ZIP) *4b. Telephone No.* (510) 656-9901; Fax (510) 656-9904
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Region 5, 45201 Fremont Boulevard, Fremont, CA 94538

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Margo A. Feinberg
MARGO A. FEINBERG

of SCHWARTZ, STEINSAPIR, DOHRMANN & SOMMERS LLP
Attorneys for Charging Party
Telephone: (323)655-4700; Fax (323)655-4488
Date: December 20, 2011

Address: 6300 Wilshire Blvd., Suite 2000
Los Angeles, California 90048

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (US. CODE, TITLE 18, SECTION 1001)

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FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

FIRST AMENDED

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
32 -CA-071247	3/5/2012

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Tesla Motors, Inc.

b. Tel. No. (650) 681-5101

c. Cell No.

f. Fax No.

d. Address *(Street, city, state, and ZIP code)*
500 Deer Creek Road
Palo Alto, CA 94304

e. Employer Representative
(b) (6), (b) (7)(C)

g. e-Mail

h. Number of workers employed
125

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
factory

j. Identify principal product or service
automobiles and automotive products

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
In the past six months the Employer has terminated (b) (6), employees, (b) (6), (b) (7)(C) in retaliation for their protected concerted activities.

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OAKLAND, CA.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO

4a. Address *(Street and number, city, state, and ZIP code)*
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Region 5, 45201 Fremont Boulevard, Fremont, CA 94538

4b. Tel. No.

4c. Cell No.

4d. Fax No

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Margo A. Feinberg
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Tel. No. (323) 655-4700

Office, if any, Cell No.

Fax No. (323)655-4488

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Address Schwartz, Steinsapir, Dohrmann & Sommers LLP
6300 wilshire Blvd., Suite 2000, Los Angeles, CA 90048

March 5, 2012
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

JH/DCP

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January 30, 2012

VIA FACSIMILE (510) 637-3315 AND U.S. MAIL

D. Criss Parker, Field Attorney
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5224

Re: Tesla Motors/Case 32-CA-071247

Dear Mr. Parker:

This position statement is submitted on behalf of Tesla Motors, Inc. ("Tesla" or the "Company") in response to the above-referenced unfair labor practice charge (the "Charge") filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Region 5 (the "Union").[1] In the Charge, the Union alleges that the Company violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Act") when it terminated the employment of (b) (6), (b) (7)(C) [redacted]. The Union claims the Company terminated these employees for engaging in union activities and for support of the Union's organizational campaign without providing any specific allegation of such purported activity or support. The Union's allegations lack factual and legal merit and should therefore be dismissed.

1. SUMMARY OF POSITION

Tesla's business is in the midst of significant changes. Since its founding, Tesla has been focused on the manufacture and sale of its first vehicle, the Tesla Roadster, and stand-alone electric vehicle battery packs for Daimler. Manufacturing for both of these programs came to conclusion at the end of 2011, and significant manufacturing operations will not be required until later in 2012 when Tesla's new vehicle, the Model S, is ready for production.

[1] By submitting this statement, the Company seeks only to assist you in your investigation and does not waive its right to present new or additional facts or argument based on subsequently acquired information or evidence. The Company reserves the right to submit a full statement during the course of these proceedings. This letter shall in no way constitute an affidavit or sworn statement as evidence of any kind in any administrative or judicial proceeding in connection with this case or any other matter. The Company reserves the right to contest the use of this statement as evidence of any kind and asks that the information contained herein be kept confidential.

To adjust to this transition in its business and operations, and in an effort to maintain productivity and prevent employees from being involuntarily sent home for lack of work, Tesla eliminated positions that were no longer necessary. In conducting the eliminations, Tesla did a thorough review of the affected positions, which included a review of objective employee evaluations to ensure fairness and consistency. As set forth herein, and contrary to the Union's allegations, this objective criteria did not consider or contemplate union involvement or protected activities. As set forth below, Tesla unequivocally denies the Union's allegations, and respectfully requests that the Charge be dismissed.

2. BACKGROUND INFORMATION

a. Company Background

Tesla was founded in 2003 by a group of Silicon Valley engineers who envisioned that affordable electric vehicles would be embraced by consumers. The Company designs, manufactures, and sells its own electric cars (currently, the Roadster is the only Tesla vehicle to reach market) and has also developed and manufactured electric vehicle components, primarily lithium-ion battery packs, to power Daimler electric vehicles.

The body and chassis assembly for the Roadster is contracted to Lotus Cars Limited ("Lotus") and takes place at Lotus' facility in Hethel, England. To support the manufacture of the Roadster and the Daimler battery packs, Tesla operated two powertrain production programs at its facility in Palo Alto, California. However, at the end of 2011, both the Roadster and Daimler battery packs reached the end of their respective product lifecycles, and both programs have now been essentially shut down.

b. Powertrain Operations

i. End of Tesla Roadster Program

Tesla began production of the Roadster in 2008. Since that time, over 2,100 of these vehicles have been sold worldwide. While the long-term goal of Tesla has always been to make electric vehicles affordable for consumers, Tesla targeted "early adopters" of electric vehicles with its Roadster model in order to optimize and prove its technology before delivering its vehicles to mainstream consumers. This limited market strategy meant the Roadster would be a relatively low-volume production vehicle. In addition, because the Lotus plant where the Roadster is manufactured had to be retrofitted by Lotus at the end of 2011, Tesla's plan was always to limit Roadster production. Production of the Roadster is now essentially complete as Tesla reaches the end of its 2,500 vehicle production run. In 2011, Tesla sold its last Roadster in North America and is winding down the remaining production for other countries. The production line that previously produced approximately 15 battery packs each week has now shut down, with only service support pack work remaining (at a production rate of less than one pack per week).

ii. End of Daimler Program

Daimler had an agreement with Tesla to produce several thousand battery packs for Daimler's electric vehicles. To fill these orders, Tesla ran a separate program dedicated to the production of Daimler battery packs. Tesla completed production of the battery packs for Daimler at the end of 2011, and Tesla does not currently have any further business with Daimler. The Daimler program that was producing 55 battery packs each week with a crew of over 50 employees across two shifts has now shut down, and only service support pack work remains (at a production rate of approximately eight packs per week and a crew of 9 employees).

iii. Model S Production Has Not Begun

In 2010, Tesla purchased the former NUMMI plant in Fremont, California in preparation for production of its Model S electric sedan. Model S production has not yet started, and the Model S powertrain program will not be fully operational until the car is ready for production later this year.

When production begins at the Fremont plant, the powertrain program will be completely different from the manual assembly lines that took place in Palo Alto. With the Company's growth, anticipated volumes and additional resources, the Company has invested heavily in an automated high-volume manufacturing line. Some of the positions held in legacy programs will not be needed for the Model S program because they are redundant of automated processes and/or do not fit the specific needs and skills required for the new Model S manufacturing operations.

c. End of Product Life-Cycles Required Job Elimination

With the end of Roadster and Daimler production, Tesla's production lines in Palo Alto were no longer necessary. Because of the end of the production life of these products, maintaining the same workforce in its Powertrain Operations Group would not be financially or operationally sound. The Company was, and always has been, operating at a loss and, in fact, had a loss of approximately $173 million in the first nine months of 2011.

The battery production line in the Daimler program consisted of more than 20 employees in each of the day and swing shifts. Now, the only production activity at the Palo Alto facility of Tesla is for a very limited number of service support packs, and Tesla has kept only a skeleton crew to support that production. Additionally, it is clear that the Model S program, although not yet fully operational, will not require the same workforce as the retired programs (in terms of skill and relative size) due to the many technological innovations being implemented at the Fremont factory. As a result, the powertrain production workforce was not sustainable at its then-current level.

In fact, since Tesla understood that the Roadster and Daimler programs would end at the end of 2011, the decision to eliminate jobs in Powertrain Operations had been planned for and discussed among management for several months prior to the actual terminations. Initially, the budgeting forecast called for an elimination of approximately 40 positions on the production lines, but managers in the Powertrain Operations fought to keep as many jobs as it could in order to preserve employee morale. The number was then lowered to approximately 20 employees, and after another proposal to keep as many jobs as possible, the number was reduced again to 14 eliminated positions.[2]

The powertrain division determined that there were seven contract or temporary positions that could be eliminated. This still left seven full-time positions for elimination.

d. Evaluation Of All Powertrain Production Employees For Job Elimination

In order to determine which positions would be eliminated, Tesla's Powertrain Operations Group evaluated its production employees based on certain objective criteria, including: performance, work ethic, teamwork, attention to detail, initiative, innovation, resourcefulness, and attendance. This evaluation process was conducted by the senior management team of Powertrain Operations working in conjunction with the Human Resources division.

The evaluation process included several layers of data gathering and analysis. For instance, the Third Quarter Performance Check-Ins ("Q3 Check-Ins"), which are performance reviews conducted by the employees' supervisors, were reviewed for all powertrain employees and considered for performance evaluations. The Q3 Check-Ins are part of Tesla's regular review process and were not implemented specifically to identify candidates for the job elimination. To ensure fairness in incorporating the Q3 Check-Ins, the scores were calibrated across individual supervisors in order to obtain standardized performance scores amongst the entire group being evaluated. The evaluation team also gathered direct information related to the above criteria from the supervisors on the various lines and shifts as another level of analysis. The standardized performance information was then evaluated and harmonized with the other objective evaluation criteria.

(b) (6), (b) (7)(C) were involved in this evaluation process. After this evaluation team analyzed the information that it had compiled, (b) (6), (b) (7)(C) made the final evaluation decisions. (b) (6), (b) (7)(C) and members of (b) (6), team were involved in this entire process and also conducted a final review of the evaluation decisions.

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[2] Exhibit 1 is a financial plan from early 2011 reflecting the planned reduction in headcount in Tesla's powertrain operations.

If several employees had the same score, the level of need for the specific job function in which that person was employed was considered to break any ties for job elimination. If it was determined that the particular position would continue or that the position was of a higher skill that enabled an easier transition to a new position within Powertrain Operations, then those determinations factored into the evaluations. Top performers either remained at their current posts or were used to fill other positions within the Powertrain Operations.

The process described above was designed to ensure an absolutely objective selection process that did not consider Union affiliation or activity. Using an employee's status as a former NUMMI employee as a proxy for Union affiliation or activity[3] demonstrates the following: Of the 128 employees evaluated from Powertrain Operations, 14 of the employees identified themselves as formerly employed by NUMMI (and presumably covered by that collective bargaining agreement). After the job elimination, 12 of these former NUMMI employees remain employed by Tesla.

i. (b) (6), (b) (7)(C) Evaluation

(b) (6), (b) (7)(C) was hired on (b) (6), (b) (7)(C) as an (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) for Powertrain Operations.[4] On (b) (6), (b) (7)(C) 2011, in an effort to standardize job titles and pay rates within Powertrain Operations, (b) (6), (b) (7)(C)' salary and job title changed at the same time as over 100 other employees in the Powertrain Operations Group.[5] As part of the standardization, (b) (6), hourly rate increased from (b) (6), (b) (7)(C) and (b) (6), title changed from (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) However, as indicated on the internal change notice form, this standardization was not a promotion. In fact, during (b) (6), time at Tesla, (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) primary responsibility (b) (6), (b) (7)(C) of the Daimler production line.

(b) (6), (b) (7)(C) received a Q3 Check-In in 2011.[6] (b) (6), received a "Below Expectations" rating for the performance dimensions of "Continuous Improvement" and "Standardized Work," and (b) (6), overall rating of (b) barely met the threshold of "Fulfills Expectations" and was amongst the lowest of (b) (6), team.

Further, (b) (6), (b) (7)(C) was the slowest performer on (b) (6), team. During benchmarking and planning tests, (b) (6) was also noted as intentionally slowing down (b) (6), work time to lower expectations, even though (b) (6) had demonstrated the capability of completing (b) (6), tasks much faster. (b) (6), (b) (7)(C) was also overheard encouraging others to slow down their work times in order

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3 In connection with the preparation of this letter, Tesla reviewed all resumes of evaluated employees to determine if they had previously worked at NUMMI.

4 Exhibit 2.

5 Exhibit 3.

6 Exhibit 4.

to game the Company for overtime. In addition, [redacted] performance did not reflect Tesla's important emphasis on continuous improvement and pride in work. Of the individuals who performed [redacted], [redacted] was the lowest performing person evaluated in that area.

Finally, [redacted], which was [redacted], will be automated through robotic assembly at the factory in Fremont when the Model S is eventually ready for production. Across the board, the number of people involved [redacted] will not carry forward from the manual assembly of the Daimler program to the automated assembly of the Model S program. With more [redacted] than positions available in Powetrain Operations, [redacted] was one of the [redacted] positions eliminated.

ii. [redacted] Evaluation

[redacted] was hired on [redacted] as an [redacted] for Powertrain Operations.[7] Similar to [redacted], on [redacted] 2011, as part of the Powertrain Operations Group's standardization efforts [redacted] job title changed to [redacted] and [redacted] hourly pay rate was increased from [redacted][8] [redacted] while employed at Tesla.

[redacted] also received a Q3 Check-In in 2011.[9] While [redacted] evaluation notes that [redacted] performance rating was at least at the level of "Fulfills Expectations" for all performance dimensions, [redacted] overall rating was not much higher than [redacted] and was among the lowest within [redacted] team. Further, once the Q3 Check-Ins were standardized across the teams to ensure fairness, the data showed that [redacted] performance was in the bottom of those being evaluated.

At the time of [redacted] termination, [redacted] responsibility [redacted] of the Daimler program. [redacted] The entire [redacted] shift for the Daimler program was eliminated and consolidated into a thinly staffed day shift that could not support [redacted] position. For the Model S production line (which is still months away from full operation), the same work will be done by a new automated piece of equipment, and so [redacted] position was considered redundant.

[redacted] relative performance rating, which resulted in [redacted] being evaluated towards the bottom of those considered for job elimination, the automation of [redacted] job duties and the shutdown of the [redacted] shift on which [redacted] worked were the reasons for [redacted] termination.

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7 Exhibit 5.

8 Exhibit 6.

9 Exhibit 7.

e. All Terminated Employees Were Treated The Same Without Regard To Union Affiliation

All [redacted] employees who were affected by the job elimination, [redacted] full-time and [redacted] temporary, were treated the same upon termination. After separation, no other permanent or temporary employees were hired to fill any of their job functions, as all of these positions were eliminated. Moreover, each of these [redacted] individuals were told that they could apply for any new positions that became available and that they would be considered with the other applicants. Since the job eliminations, neither (b) (6), (b) (7)(C) have applied for new positions at Tesla.

In addition, none of the employees whose positions were eliminated were considered for transfers from the Powertrain Operations division to other manufacturing divisions within Tesla (specifically, Vehicle Manufacturing). Such transfers were not considered for a number of reasons. For one, the employees whose positions were eliminated were not considered to be strong performers. Also, with the move from manual production of the Roadster and Daimler programs to the automated production of the Model S, different skills would be needed. In addition, each division maintains its own budget and operations. For instance, the hiring and budgeting personnel and structure for Vehicle Manufacturing is different than the hiring and budgeting structure for the powertrain production. The vehicle manufacturing organization requires a more rigorous recruiting process that includes the applicant taking specialized tests designed to assess an applicant's abilities with respect to safety, quality and dependability; work simulations to test skills, efficiency and quality; and medical evaluations to assess physical capabilities for performing vital job functions. This additional rigor was not part of the recruiting process for the Powertrain Operations division, which generally hired by converting temporary contract employees to full-time.

Further, many of the jobs in Vehicle Manufacturing were considered to be more specialized to specific manufacturing processes that were not part of Powertrain Operations (*e.g.*, aluminum stamping, paint, injection molding and equipment maintenance). Because of these operational differences and needs (and delayed timing for such needs), transfers were not considered for any affected employee.

Finally, Tesla's treatment of these terminated employees is consistent with the way the Company has handled such situations in the past. Previously, on a much larger scale, Tesla cut its employee headcount by more than 20 percent in 2008 for budgetary reasons. During that reduction, Tesla did not offer to transfer any of the affected employees to other positions. With time, however, some of those affected employees applied for new positions with the Company and were rehired.

f. Any New Job Openings At Tesla Are Not In The Powertrain Programs That Were Affected By The Job Elimination

As previously mentioned, there are no significant powertrain operations at either the Fremont or Palo Alto facilities at this time, and such operations will not increase significantly until some future time when the Model S is ready for production or the Company obtains additional component business. Moreover, any advertised openings at the Company are based on projected needs at that facility and do not reflect the specific situation with which the powertrain production lines were faced during the job elimination.

In any event, none of the advertised positions are for openings on the Roadster or Daimler production lines as those lines have completed their limited production. Indeed, even after the job elimination, there have been instances in Powertrain Operations where employees are idle or involuntarily sent home because the production demands are so low.

3. LEGAL ANALYSIS

a. Legal Standard

The National Labor Relations Act prohibits "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). The Board has established a causation test for analyzing alleged violations of sections 8(a)(1) and 8(a)(3) of the Act. Wright Line Inc., 251 NLRB 1083, 1089 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981). Under the Wright Line test, the Union must initially "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision."[10] Id.

To demonstrate a *prima facie* case, the Charging Party must show that: (1) the employee engaged in protected activity known to the employer, and (2) the protected conduct is a substantial or motivating factor for the employer's action. See, e.g., Peter Vitalie Co., Inc., 310 NLRB 865, 871 (1993) (explaining that "[t]he classic elements commonly required to make out a *prima facie* case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus"). "[I]n the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred." CEC Chardon Electrical, 302 NLRB 106, 107 (1991). Without proof of employer animus, it is irrelevant whether or not the employer would have taken the action in question in the absence of protected activity--the allegation must fail. See, e.g., Upper Great Lakes Pilots, Inc., 311 NLRB 131, 136 (1993) (deciding that "[b]ecause we find that the evidence does not support a finding of retaliatory

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[10] Unwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participation in union activities. Determining whether an employer's actions were motivated by anti-union animus is necessarily the crucial first step in a § 8(a)(3) case. See NLRB v. Nueva Eng'g, Inc., 761 F.2d 961, 967 (4th Cir. 1985).

motive, we need not decide whether the Respondent established that it would have laid the pilots off and discharged them even if they had not engaged in protected activities"); Yusuf Mohamed, 283 NLRB 961, 962-64 (1987) (recommending that Section 8(a)(3) allegations be dismissed based on the General Counsel's failure to make out a *prima facie* case).

If the Union meets this initial burden, only then does the burden shift to the employer to rebut the *prima facie* case, by demonstrating a legitimate, nondiscriminatory motive for its actions. See Upper Great Lakes Pilots, Inc., 311 NLRB at 136; Wright Line, *supra*, 251 NLRB at 1089. It is not for the Region or the Board to evaluate whether or not the reasons asserted make sound business sense. An employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. Ryder Dist'n Resources, Inc., 311 NLRB 814, 816-17 (1993) ("[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change."), *citing* NLRB v. Savoy Laundry, 327 F.2d 370, 371 (2d Cir. 1964), *enforcing in part* 137 NLRB 306 (1962); see also Liberty Homes, Inc., 257 NLRB 1411, 1412 (1981) (explaining that the Board should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); Super Tire Stores, 236 NLRB 877, 877 n.1 (1978) (stating that "Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position").

Throughout this burden shifting analysis, the ultimate burden remains on the Union to prove the elements of an unfair labor practice by a preponderance of the evidence. Wright Line, *supra*, 251 NLRB at 1088 n.11.

b. The Union Cannot Meet Its Burden That Anti-Union Animus Motivated The Job Elimination Decision, And Tesla Had A Legitimate, Non-Discriminatory Reason For (b) (6), (b) (7)(C) Terminations

The Union has **no** evidence that any alleged protected activity was a *substantial* or *motivating* reason, or any reason at all, for the job elimination or the employee selection process. Indeed, the job elimination was the product of several independent factors that had nothing to do with union activity, such as end of product life-cycles for both the Roadster and Daimler powertrain programs. These factors created an economic and business necessity for the job elimination. Furthermore, the Union has made no specific allegations of any union activity in which these (b)(6), (b) employees purportedly engaged. Thus, it cannot be disputed that the job elimination was instituted for legitimate business reasons, having nothing to do with anyone's protected activity.

Additionally, employees were selected for job elimination based on evaluations using objective criteria that were independently reviewed by both members of Powertrain Operations management and the Human Resources. Such objectivity and review ensured fairness in the selection process. As discussed above, most of the employees whose jobs were

eliminated had no known Union or NUMMI affiliation. Additionally, many employees who were former NUMMI employees remain employed by Tesla because of their superior performance and skill. Union affiliation simply played no part in the evaluation and selection process. Thus, the Union has not and cannot meet its *prima facie* burden, and the Company clearly had a legitimate, business need for its decision.[11]

c. The Union's Mere Suspicions Of Improper Motives And Speculative Conjecture Do Not Establish A *Prima Facie* Case For Retaliation

The Union's subjective belief that [redacted] employees' jobs, out of [redacted] affected positions, were eliminated for engaging in alleged protected conduct is insufficient to overcome the substantial and incontrovertible objective evidence demonstrating that employee evaluations based on objective factors were the logical and legitimate selection criteria used by the Company. "Mere suspicion cannot substitute for proof" with respect to a claim of retaliation. See Reliable Disposable, Inc., 348 NLRB 83 (2006) (holding that speculation and tenuous inferences cannot be relied on); Verland, 296 NLRB 442, 448 (1989) (holding that a *prima facie* case may not be based on speculation); Lasell Junior College, 230 NLRB 1076 n. 1 (1977) ("mere suspicion cannot substitute for proof of an unfair labor practice"); Neptco, Inc., 346 NLRB 6 (2005) ("mere suspicion of unlawful motivation. . . is not sufficient to constitute substantial evidence"). A Charging Party's subjective belief, standing alone, is merely a form of conjecture or speculation, which the NLRB has always rejected as the basis for a claim. The vagueness of the allegations in the subject Charge also confirms that the claim here is founded on pure speculation, and is therefore without merit. As such, the Charge should be dismissed.

d. Neither The Board Nor The Union May Second-Guess The Employer's Job Elimination Decision

Tesla had legitimate business reasons for separating the employees selected for job elimination. The jobs were eliminated because of a consolidation of legacy programs in Powertrain Operations, and after management performed a thorough and objective review of powertrain employees. Those actions did not violate the NLRA because the Employer did not consider any alleged protected activities in making its decision. As the Seventh Circuit has observed, "[t]he ALJ and board are not business managers who decide what is best for business. . . Congress has left to management the decision of whether a reduction in the number of employees is necessary. . . ." Midwest Stock Exch., Inc., v. NLRB, 635 F.2d 1255 (7th Cir. 1980); see also Merchants Truck Line, Inc. v. NLRB, 577 F.2d 1011, 1014 (5th Cir. 1978) ("Discharge is a traditional management prerogative; lack of justification is not to be lightly inferred.").

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[11] The January 17, 2012 letter from the Region fails to identify other employees who were not terminated and had lower skill sets or performance than the alleged discriminatees (b) (6), (b) (7)(C) If the Region provides that information, the Company will review it and provide a further response.

Further, determinations regarding hiring and firing employees take on additional importance when a company is faced with an economic necessity. As a result, courts have carefully limited the Board's interference with discharge decisions in these types of circumstances, explaining that an employer is free to dismiss an employee for "good cause, no cause, or for any reason [it] chooses except the employee's union activity." See ARA Leisure Servs., 782 F.2d 456, 462 (4th Cir. 1986). Even where a *prima facie* case of discriminatory discharge has been presented, the employer must be given the opportunity to rebut that case by presenting a valid business justification. Nueva, 761 F.2d at 967.

Here, there is no question that the job elimination was economically justified. As discussed above, the sole reasons for the job elimination were the essential shutting down of both the Roadster and Daimler programs and the automation and streamlining on the upcoming Model S program, which is not yet operational. Further, the selection methodology for the job elimination was based on objective evaluations. Therefore, the instant Charge should be dismissed.

4. CONCLUSION

As set forth above, the conclusion of Roadster and Daimler powertrain manufacturing coupled with the lack of need for manufacturing on the not yet operational Model S program took its toll on Tesla's operations. Despite the Union's attempts to concoct allegations of retaliation, there exists no factual support for such a claim. The Union has not and cannot show that union or concerted activity in any way motivated the job elimination or selection process. Quite to the contrary, the job elimination was undertaken to minimize employee idle time and days where employees had to be sent home for lack of work. Further, the employee selection process used to determine who would be affected by the job elimination was founded on objective criteria. Based on the foregoing, the Company asks that the Union's Charge be dismissed.

Sincerely,

Ronald J. Holland

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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Enclosures

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December 27, 2011

BY E-MAIL AND REGULAR MAIL

D. Criss Parker, Esq.
Field Attorney
National Labor Relations Board
Region 32
1301 Clay Street, Room 300-N
Oakland, California 94612-5211

Re: **Tesla Motors, Inc.**
32-CA-071247

Dear Mr. Parker:

This office represents the Charging Party, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. This letter represents the UAW's position statement in this matter.

The UAW represented the workers at the Fremont, California plant for decades, both during the years that General Motors operated the plant and while it was run by New United Motor Manufacturing, Inc. After NUMMI ceased operations at the plant in 2010 Tesla Motors, Inc. acquired the plant.

Tesla has not yet begun operations at the Fremont plant. It does, on the other hand, run a battery plant in Palo Alto, California, where a number of former NUMMI employees are employed. Tesla has told employees at the battery plant that it intends to transfer a number of its battery plant workers the Fremont plant when it begins operations there in early 2012.

While the Fremont plant has not yet opened, the UAW has already launched an organizing campaign, working with Union supporters within the battery plant. Its first (b) (6), (b) (7)(C) in-plant organizers there were (b) (6), (b) (7)(C).

Tesla has responded to the campaign by offering (b) (6), (b) (7)(C) a management position and laying off (b) (6), (b) (7)(C). The circumstances of their termination make it clear that Tesla has retaliated against them based on their union activities.

1. TESLA KNEW THAT (b) (6), (b) (7)(C) WERE UNION ACTIVISTS

(b) (6), (b) (7)(C) were (b) (6), (b) (7)(C) Union supporters within the plant. They (b) (6), (b) (7)(C) organized several union meetings, which they publicized by both word of mouth and handing out announcements to their coworkers. At the first meeting, on (b) (6), (b) (7)(C) 2011, (b) (6), (b) (7)(C) brought together 25 Tesla workers to discuss what needed to be done to organize the plant. (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) announced that they were as (b) (6), (b) (7)(C) and asked employees there to sign up for their committee; nearly all of those in attendance did.

At the second meeting, held on (b) (6), (b) (7)(C) 2011, (b) (6), (b) (7)(C) circulated a letter that responded to the recent pay increases that Tesla had implemented by asking Elon Musk, the CEO of Tesla, to respect Tesla employees' right to union representation by honoring the UAW's Fair Election Principles. A copy of that letter is attached; a signed version was later delivered to Musk.

(b) (6), (b) (7)(C) also had frequent conversations with co-workers about the Union. (b) (6), (b) (7)(C) asked a number of coworkers to help (b) (6), (b) (7)(C) collect the names of all of the employees—called "team members" by Tesla—on the (b) (6), shift. (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) responded by giving (b) (6), (b) (7)(C) a list of all of these employees' names.

(b) (6), (b) (7)(C) discussed (b) (6), (b) (7)(C) support for the Union organizing drive on a number of occasions. (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C) 2011 and (b) (6), (b) (7)(C) several months later.

(b) (6), (b) (7)(C) had a very similar experience in 2011 with a coworker (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) in a breakroom conversation last summer that (b) (6), (b) (7)(C) felt that the Company was not treating (b) (6), (b) (7)(C) fairly and was demanding too much of (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) if (b) (6), (b) (7)(C) knew anything about the UAW and then explained to (b) (6), (b) (7)(C) that at NUMMI the Company treated workers with respect because of the Union's presence there.

(b) (6), (b) (7)(C) was hesitant to support the Union—as (b) (6), (b) (7)(C) put it, Tesla "was not big on the Union"—and asked (b) (6), (b) (7)(C) to keep their conversation quiet. (b) (6), (b) (7)(C) had a number of other conversations with (b) (6), (b) (7)(C) about the Union in the months that followed, before (b) (6), (b) (7)(C)

2. TESLA LAID OFF (b) (6), (b) (7)(C) IN RETALIATION FOR THEIR UNION ACTIVITIES

Tesla has announced that it will be commencing operations at the Fremont plant in the next few months and will be making deliveries of vehicles produced there in mid-2012. It has told employees at the battery plant that it plans to employ roughly 400 workers at its Fremont operations, of which a number will be battery plant workers transferred there.

This makes it even more remarkable that, just as Tesla starts to gear up to expand its Bay Area operations, it has chosen to lay off (b) (6), (b) (7)(C) on (b) (6), (b) (7)(C) 2011. This decision is (1) contrary to Tesla's practices and (2) based on patently false claims that there is insufficient work, when in fact both (b) (6), (b) (7)(C) are qualified to fill any number of positions for which Tesla is recruiting employees.

First, as (b) (6), (b) (7)(C) will testify, when Tesla has faced temporary slow periods in the past, it has responded by sending workers home for a few days, rather than laying them off altogether. Tesla's decision to lay off (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) rather than simply cut back on their hours, is at odds with that practice.

Tesla has not merely laid off (b) (6), (b) (7)(C) --it has terminated them. Despite its insistence that it has no policy or procedure requiring payment of any severance benefits, it has offered both of them severance payments in the high four figures, in return for which it has asked for a release of any and all claims, known and unknown, that they might have against Tesla and their promise not to disparage the Company "in any manner likely to be harmful to [it]." Tesla wants to not only buy off any claims they might have, but to buy their silence as well.

Second, Tesla's stated basis for laying off (b) (6), (b) (7)(C) is simply false. While Tesla claims that it has no work for either (b) (6), (b) (7)(C) it has, in fact, retained a number of other workers, including some temporary employees, to do the same tasks that (b) (6), (b) (7)(C) had performed.

Nor can Tesla claim that it had no other work for (b) (6), (b) (7)(C) It has posted a number of jobs for which it is seeking applicants at both its Palo Alto and Fremont operations that (b) (6), (b) (7)(C) could fill; a copy of the posting is enclosed. But management had no desire to find room for either (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) instead its priorities were (1) to get rid of them and (2) to buy their neutrality if possible.

Tesla may claim that it thought that [redacted] job performance was not up to its standards. That is, once again, simply false.

Both [redacted] were exemplary workers. [redacted] began working for Tesla in [redacted] Management told [redacted] when [redacted] received [redacted] to the Wire Bond area, that [redacted] was the best qualified for the position. [redacted] not only received constant praise for [redacted] work there, but was chosen to train [redacted] at Tesla and another [redacted] NUMMI employee, on how [redacted] position worked. [redacted] a member of Tesla's [redacted] went out of [redacted] way to tell [redacted] that [redacted] was a good employee at the time they laid [redacted] off.

[redacted] was likewise an excellent employee. [redacted] called [redacted] after [redacted] layoff was announced to tell [redacted] that [redacted] felt terrible about the decision, that it was no reflection on the work [redacted] did, that [redacted] was a "great [redacted] to work with" who "worked [redacted] ass off." I will forward a saved version of that voice mail message by email; [redacted] will authenticate the recording.

Tesla laid off [redacted] employees named [redacted] at the same time. Those employees were not Union activists and did not have the exemplary records that [redacted] had. Their layoffs were timed to provide camouflage for management's decision to lay off [redacted]

[redacted] will be available to give a statement [redacted]; [redacted] will give [redacted] statement after [redacted] returns from [redacted] Please do not hesitate to call if you have any questions or wish to discuss this further.

Very truly yours,

Henry M. Willis

HMW[redacted]
Enclosures

cc: Jim Soldate, UAW, Region 5 (via e-mail)
Gary Jones, UAW, Region 5 (via e-mail)
Jeff Sodko, International Union, UAW (via e-mail)

Dear Mr. Musk:

Over the past two weeks there have been conversations among both employees and managers at Tesla about the possibility of Tesla employees forming a UAW bargaining unit. In the context of these conversations, you have given us a much needed wage increase and made promises of other improvements at Tesla. We appreciate your addressing of the issue of fair wages so quickly and look forward to working with you and your management team on other issues of concern to Tesla workers.

As dedicated Tesla workers we are committed to helping this company succeed and to adding value to the company. We feel strongly that the most effective way for workers to contribute and have a real voice in the decision making process of Tesla is by organizing our UAW bargaining unit and engaging in collective bargaining. We desire a true partnership between the company and our union. Cooperation and mutual respect are essential to succeeding in a global economy, and we, the supporters of the UAW, have embraced innovation, flexibility and continuous improvement as part of our mission at Tesla.

We believe strongly that if Tesla becomes a UAW company, the union will add value for the employees, shareholders and customers.

We have learned that in the United States, the process by which employees decide on unionization is flawed and unworkable. The federal labor laws do not effectively prevent employers from implying that there are negative consequences that result from unionizing. The law also does not allow equal access so employees can hear from both the union and the company. We believe in democracy and in full access to all facts and hearing from different viewpoints so as to be able to make the best informed decision possible. Democracy has been described as a free market place of ideas where informed citizens make their decisions with full information.

We support the UAW Fair Election Principles because they are consistent with and ensure the democratic principles and values we believe in. These Principles ensure that workers hear from both the company and the union, with equal time for both sides. For example, if you can meet with employees for 30 minutes as part of a campaign to convince employees to

oppose the union, then the union would be allowed to hold a meeting of equal length at the workplace.

We believe that because you believe in us, your Tesla employees, and in our basic intelligence and fairness that when you review the UAW Fair Election Principles you will agree to abide by them in order to honor our basic human right to decide for ourselves if we want to form our UAW bargaining unit and engage in the basic democratic right of collective bargaining.

This is why we are asking you to agree to abide by the Fair Election Principles, so that Tesla employees can freely vote on whether or not to join the UAW.

If you have any questions let us know or if you would like to sit down with us and UAW leaders to discuss this we would be happy to.

Thank you very much for your consideration.

Sincerely,

Tesla employees:

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
REGION 32
1301 CLAY ST
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OAKLAND, CA 94612-5224

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June 28, 2012

MARGO A. FEINBERG, ESQ.
SCHWARTZ, STEINSAPIR, DOHRMANN
& SOMMERS
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LOS ANGELES, CA 90048-5268

Re: Tesla Motors, Inc.
Case 32-CA-071247

Dear Ms. FEINBERG:

We have carefully investigated and considered your charge that TESLA MOTORS, INC. has violated the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have decided to dismiss your charge because there is insufficient evidence to establish a violation of the Act.

Your Right to Appeal: You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at www.nlrb.gov. However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision to dismiss your charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date: The appeal is due on **July 12, 2012**. If you file the appeal electronically, we will consider it timely filed if you send the appeal together with any other documents you want us to consider through the Agency's website so the transmission is completed by **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the Office of Appeals in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than July 11, 2012.

Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to

www.nlrb.gov, click on **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions. The fax number is (202)273-4283. A request for an extension of time to file an appeal **must be received on or before July 12, 2012.** A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality: We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,

/s/ WILLIAM A. BAUDLER

WILLIAM A. BAUDLER
Regional Director

Enclosure

cc GENERAL COUNSEL
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